

EXHIBIT E

From: [Kirstie A. Means](#)
To: [James P. Blenk](#); [Spencer Durland](#); [Nicole Austin](#); [Meredith Vacca](#); [Thomas R. Southard](#); [John Lyle](#); [Katelyn Popp](#)
Cc: [Hanft, Gideon A.](#); [Firsenbaum, Ross](#); [Perio, Ryanne](#); jbrudin@rudinlaw.com; [Brian C. Mahoney](#); buffalo_5_plaintiff_counsel@list.wilmerhale.com; [Jennifer C. Persico](#)
Subject: RE: Final Jury Instructions and Special Verdict Form
Date: Monday, April 7, 2025 10:34:31 AM
Attachments: [image001.png](#)
[image364934.png](#)

Dear Judge Vacca, Ms. Austin, and Counsel:

Below please find the County's proposed instruction relative to its affirmative defense on the issue of apportionment.

The County has asserted an affirmative defense that the City of Buffalo Police Department, including the individual officers thereof, were responsible, at least in part, for any alleged deprivation of Mr. Walker's fair trial rights. A police officer violates a criminal defendant's right to a fair trial by fabricating evidence that was used against a defendant in the criminal case. Such a claim requires showing each of the following three things by a preponderance of the evidence: (1) The officer knowingly fabricated evidence that was introduced against Plaintiff at his criminal trial (2) The evidence was material, and (3) Plaintiff was damaged as a result.

If you find that each of these elements are met, you should apportion liability against the City of Buffalo Police Defendants based on what you determine to be the relative fault in causing or contributing to Plaintiff's alleged damages. Upon such a finding, you will state the percentage of fault, if any, of the County of Erie and the Buffalo Police Department employees, and the total of these percentages must add up to 100 percent.

https://www.ca7.uscourts.gov/pattern-jury-instructions/7th_cir_civil_instructions.pdf (7.14 FAIR TRIAL: CONCEALMENT OF EXCULPATORY EVIDENCE / FABRICATION OF EVIDENCE)

Respectfully submitted,

Kirstie A. Means
Partner

Lippes Mathias LLP



50 Fountain Plaza, Suite 1700
Buffalo, NY 14202-2216

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From: James P. Blenk <jblenk@lippes.com>
Sent: Monday, April 7, 2025 10:28 AM
To: Spencer Durland <sdurland@hooverdurland.com>; Nicole Austin <Nicole_Austin@nywd.uscourts.gov>; Kirstie A. Means <kmeans@lippes.com>; Meredith Vacca <Meredith_Vacca@nywd.uscourts.gov>; Thomas R. Southard <tsouthard@lippes.com>; John Lyle <John_Lyle@nywd.uscourts.gov>; Katelyn Popp <Katelyn_Popp@nywd.uscourts.gov>
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Subject: RE: Final Jury Instructions and Special Verdict Form

No objection to Mr. Durland's language proposed below.

James P. Blenk
Partner



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From: Spencer Durland <sdurland@hooverdurland.com>
Sent: Monday, April 7, 2025 10:25 AM
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We propose the following instruction, rather than Mr. Blenk's, to be consistent with FRE

801(d):

The contents of a prior inconsistent statement are **generally** not proof of what happened.

You may **ordinarily** use evidence of a prior inconsistent statement only to evaluate the truthfulness or accuracy of the witness's testimony here at trial. **However, where a witness was subject to cross examination about a prior inconsistent statement that was made under oath, the statement is inconsistent with their trial testimony, and was given under penalty of perjury at a trial, a hearing, or in a deposition, you may consider the prior statement for the truth.**

From: James P. Blenk <jblenk@lippes.com>

Sent: Monday, April 7, 2025 9:39 AM

To: Nicole Austin <Nicole_Austin@nywd.uscourts.gov>; Kirstie A. Means <kmeans@lippes.com>; Spencer Durland <sdurland@hooverdurland.com>; Meredith Vacca <Meredith_Vacca@nywd.uscourts.gov>; Thomas R. Southard <tsouthard@lippes.com>; John Lyle <John_Lyle@nywd.uscourts.gov>; Katelyn Popp <Katelyn_Popp@nywd.uscourts.gov>

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Subject: RE: Final Jury Instructions and Special Verdict Form

Jury Instructions – P 19: Modifications underlined...

The contents of a prior inconsistent statement are not proof of what happened, unless that statement was sworn to by the witness.

You may use evidence of an unsworn prior inconsistent statement only to evaluate the truthfulness or accuracy of the witness's testimony here at trial.

James P. Blenk

Partner



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Sent: Sunday, April 6, 2025 6:21 PM

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Subject: Final Jury Instructions and Special Verdict Form

Good evening, Counsel,

Attached are the Final Jury Instructions and Special Verdict Sheet that will be the subject of the charge conference tomorrow at 8:30am.

Nicole W. Austin

Law Clerk to Judge Meredith A. Vacca

Western District of New York

Kenneth B. Keating Federal Building

100 State Street, Rochester, NY 14614

O: 585-613-4374 | FAX: 716-613-4375

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From: Kirstie A. Means <kmeans@lippes.com>

Sent: Sunday, April 6, 2025 5:58 PM

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<jpersico@lippes.com>

Subject: RE: DX 707 and DX 697

CAUTION - EXTERNAL:

Dear Judge Vacca:

Attached please find a copy of the County's response and objections to Plaintiff's Supplemental Requests to Charge, filed moments ago at Docket 357.

Respectfully submitted,
Kirstie Means

Kirstie A. Means
Partner



50 Fountain Plaza, Suite 1700
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Cc: Hanft, Gideon A. <Gideon.Hanft@wilmerhale.com>; Kirstie A. Means <kmeans@lippes.com>; Firsenbaum, Ross <Ross.Firsenbaum@wilmerhale.com>; Perio, Ryanne <Ryanne.Perio@wilmerhale.com>; jbrudin@rudinlaw.com; James P. Blenk <jblenk@lippes.com>; Brian C. Mahoney <bmahoney@lippes.com>; buffalo_5_plaintiff_counsel@list.wilmerhale.com; Jennifer C. Persico <jpersico@lippes.com>

Subject: RE: DX 707 and DX 697

Dear Judge Vacca,

We have received your message and will confer with opposing counsel about a list of admitted exhibits. Attached please find Plaintiff's Supplemental Requests to Charge, filed on the docket just now.

Respectfully submitted,

Spencer L. Durland

From: Meredith Vacca <Meredith_Vacca@nywd.uscourts.gov>
Sent: Sunday, April 6, 2025 9:00 AM
To: Thomas R. Southard <tsouthard@lippes.com>; Nicole Austin <Nicole_Austin@nywd.uscourts.gov>; John Lyle <John_Lyle@nywd.uscourts.gov>; Katelyn Popp <Katelyn_Popp@nywd.uscourts.gov>
Cc: Hanft, Gideon A. <Gideon.Hanft@wilmerhale.com>; Kirstie A. Means <kmeans@lippes.com>; Spencer Durland <sdurland@hooverdurland.com>; Firsenbaum, Ross <Ross.Firsenbaum@wilmerhale.com>; Perio, RYANNE <RYANNE.Perio@wilmerhale.com>; jbrudin@rudinlaw.com; James P. Blenk <jblenk@lippes.com>; Brian C. Mahoney <bmahoney@lippes.com>; buffalo_5_plaintiff_counsel@list.wilmerhale.com; Jennifer C. Persico <jpersico@lippes.com>
Subject: Re: DX 707 and DX 697

Counsel:

I will get you the proposed verdict sheet and final instructions later today. A few things I wanted to bring up now.

If counsel can please come up with a mutually agreeable list of exhibits that can be sent back to the jury during deliberations when requested in a note. Please bring to court tomorrow morning. If such an exhibit is requested by the jury, we would send it back without reconvening and put it on the record the next time we meet in court.

I will not be allowing Plaintiff to recommend a certain dollar figure or range in their summation. We will put this on the record tomorrow morning.

Also, heads up for tomorrow morning. We have Grand Jury empanelment which means that there will be a lot of people going through the magnetometers starting at 8 am. I am told it will probably take an hour for everyone to go through.

Thank you!

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From: Thomas R. Southard <tsouthard@lippes.com>

Sent: Friday, April 4, 2025 9:51:48 AM

To: Nicole Austin <Nicole_Austin@nywd.uscourts.gov>; John Lyle <John_Lyle@nywd.uscourts.gov>; Katelyn Popp <Katelyn_Popp@nywd.uscourts.gov>; Meredith Vacca <Meredith_Vacca@nywd.uscourts.gov>

Cc: Hanft, Gideon A. <Gideon.Hanft@wilmerhale.com>; Kirstie A. Means <kmeans@lippes.com>; Spencer Durland <sdurland@hooverdurland.com>; Firsenbaum, Ross <Ross.Firsenbaum@wilmerhale.com>; Perio, Ryanne <Ryanne.Perio@wilmerhale.com>; jbrudin@rudinlaw.com <jbrudin@rudinlaw.com>; James P. Blenk <jblenk@lippes.com>; Brian C. Mahoney <bmahoney@lippes.com>; buffalo_5_plaintiff_counsel@list.wilmerhale.com <buffalo_5_plaintiff_counsel@list.wilmerhale.com>; Jennifer C. Persico <jpersico@lippes.com>

Subject: DX 707 and DX 697

CAUTION - EXTERNAL:

Dear Judge Vacca,

Please see the below link to a share drive that contains DX 707 (Guadagno Deposition Transcript) and DX 697 (Cosgrove Deposition Transcript) highlighted for the County's deposition designations and Plaintiff's counter designations that were received in evidence on April 3.

[REDACTED]

[REDACTED]

Thank you,

Tom Southard

Thomas R. Southard
Associate



50 Fountain Plaza, Suite 1700
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Cc: [Hanft, Gideon A.](#); [Firsenbaum, Ross](#); [Perio, RYanne](#); [jbrudin@rudinlaw.com](#); [James P. Blenk](#); [Brian C. Mahoney](#); [buffalo_5_plaintiff_counsel@list.wilmerhale.com](#); [Jennifer C. Persico](#)
Subject: RE: Final Jury Instructions and Special Verdict Form
Date: Monday, April 7, 2025 7:29:33 AM
Attachments: [image001.png](#)
[external.png](#)



Dear Judge Vacca and counsel,

In advance of this morning's charge conference, Plaintiff summarizes his principal objections to the final charge:

- The definition of materiality (pp. 29, 32) should track *Poventud v. City of New York*, 750 F.3d 121, 133 (2d Cir. 2014) (en banc) (evidence is material if there “is a reasonable probability of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” (cleaned up)). The Court should further explain that, given unanimity and reasonable-doubt requirements applicable to a criminal case, a different result means raising a reasonable doubt in the mind of at least one juror. *Cone v. Bell*, 556 U.S. 449, 452 (2009) (stating that the test for materiality is “whether there is a reasonable probability that the withheld evidence would have altered *at least one juror’s assessment* of the appropriate penalty” (emphasis added)).
- Second Circuit precedent requires that the Court’s description of damages (p.44) include loss of freedom and psychological injury. *Kerman v. City of New York*, 374 F.3d 93, 126 (2d Cir. 2004).
- Second Circuit precedent holds that the Court may not instruct the jury on nominal damages (pp.45-47) because Mr. Walker’s 1977 criminal trial indisputably resulted in a loss of liberty. *Kerman v. City of New York*, 374 F.3d 93, 124 (2d Cir. 2004) (“[W]here the plaintiff was indisputably deprived of his liberty, and the conduct of the defendant responsible for the deprivation was found to be unlawful, we have held that the plaintiff is entitled to compensatory, not merely nominal, damages.”). In addition to being forbidden as a matter of law, an instruction on nominal damages carries acute prejudice given the Court’s decision to prevent Plaintiff from proposing a damages figure or range.
- The Court’s instruction on apportionment (p.47) does not instruct the jury that apportionment is an affirmative defense, which the County bears the burden to prove, and

does not define the elements of any constitutional tort allegedly engaged in by the BPD or individual BPD officers. *Restivo v. Hessemann*, 846 F.3d 547, 586 (2d Cir. 2017) (“the jury is to decide the relative faults of the *tortfeasors*.” (emphasis added)).

Respectfully submitted,

Spencer L. Durland

From: Kirstie A. Means <kmeans@lippes.com>

Sent: Monday, April 7, 2025 6:23 AM

To: Nicole Austin <Nicole_Austin@nywd.uscourts.gov>; Spencer Durland <sdurland@hooverdurland.com>; Meredith Vacca <Meredith_Vacca@nywd.uscourts.gov>; Thomas R. Southard <tsouthard@lippes.com>; John Lyle <John_Lyle@nywd.uscourts.gov>; Katelyn Popp <Katelyn_Popp@nywd.uscourts.gov>

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Subject: RE: Final Jury Instructions and Special Verdict Form

Good morning, Judge Vacca and Ms. Austin:

In advance of the charge conference, the County respectfully submits a redlined draft of the Court’s Final Jury Charges, incorporating the County’s primary objections, in an effort to facilitate and streamline discussion. Additionally, the County notes the following objections with respect to the Court’s Special Verdict Sheet.

The County objects to **Section I (Liability)** on the grounds it: (i) fails to include a question relative to the issue of favorability and (ii) conflates the analysis required under Monell into a single question (at both questions 2 and 4). The County maintains, as was set forth in its proposed Verdict Sheet, that distinct questions should be raised on each point, particularly since the Court’s Proposed Final Jury Charges instruct the jury as to the issue of favorability and because the jury could find the existence of a custom, policy or practice, but not find that it was the moving force behind the constitutional violations alleged in this case.

As to **Section II (Damages)**, the County objects and requests to add “if any” or something similar so as to not instruct the jury that it must award compensatory damages. The County further seeks to add an additional line relative to a potential award of nominal damages, consistent with the jury instructions and to avoid confusion on this issue. The County proposes revising this section as follows:

5. If you answered YES to either *or* both of Questions 2 and 4, please identify on the line below the total amount of compensatory damages that you find Mr. Walker is entitled to for the period beginning on June 13, 1977 (the date of Mr. Walker’s conviction) until the present (if you decide not to make an award as to this item, insert the word “None”):

\$ _____

If you awarded no damages in Question 5, proceed to Question 6. If you awarded damages in Question 5, skip Question 6.

6. State the amount you award Mr. Walker in nominal damages:

\$ _____

As to the damages questions pertaining to the Buffalo Police Department, the County objects and requests to: (i) add the names of the relevant employees of the Buffalo Police Department, (ii) reference both compensatory and nominal damages and (iii) revise "also contributed" to "caused or contributed to" as follows:

Do you find that the Defendant, the County of Erie, has demonstrated by a preponderance of the evidence that the Buffalo Police Department, including its employees, Michael E. Guadagno, John Montondo, James E. Hunter, Robert Grabowski, Robert F. Arnet, Frank C. Deubell, Leo J. Donovan, Francis M. Manista, Jr., Paul R. Delano (collectively, the Buffalo Police Department), caused or contributed to Mr. Walker's damages?

Respectfully submitted,
Kirstie Means

Kirstie A. Means
Partner



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Nicole W. Austin

Law Clerk to Judge Meredith A. Vacca

Western District of New York

Kenneth B. Keating Federal Building

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Subject: RE: DX 707 and DX 697

CAUTION - EXTERNAL:

Dear Judge Vacca:

Attached please find a copy of the County's response and objections to Plaintiff's Supplemental Requests to Charge, filed moments ago at Docket 357.

Respectfully submitted,
Kirstie Means

Kirstie A. Means
Partner

50 Fountain Plaza, Suite 1700
Buffalo, NY 14202-2216

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Subject: RE: DX 707 and DX 697

Dear Judge Vacca,

We have received your message and will confer with opposing counsel about a list of admitted exhibits. Attached please find Plaintiff's Supplemental Requests to Charge, filed on the docket just now.

Respectfully submitted,

Spencer L. Durland

From: Meredith Vacca <Meredith_Vacca@nywd.uscourts.gov>
Sent: Sunday, April 6, 2025 9:00 AM
To: Thomas R. Southard <tsouthard@lippes.com>; Nicole Austin <Nicole_Austin@nywd.uscourts.gov>; John Lyle <John_Lyle@nywd.uscourts.gov>; Katelyn Popp <Katelyn_Popp@nywd.uscourts.gov>
Cc: Hanft, Gideon A. <Gideon.Hanft@wilmerhale.com>; Kirstie A. Means <kmeans@lippes.com>; Spencer Durland <sdurland@hooverdurland.com>; Firsenbaum, Ross <Ross.Firsenbaum@wilmerhale.com>; Perio, Ryanne <Ryanne.Perio@wilmerhale.com>;

jbrudin@rudinlaw.com; James P. Blenk <jblenk@lippes.com>; Brian C. Mahoney <bmahoney@lippes.com>; buffalo_5_plaintiff_counsel@list.wilmerhale.com; Jennifer C. Persico <jpersico@lippes.com>

Subject: Re: DX 707 and DX 697

Counsel:

I will get you the proposed verdict sheet and final instructions later today. A few things I wanted to bring up now.

If counsel can please come up with a mutually agreeable list of exhibits that can be sent back to the jury during deliberations when requested in a note. Please bring to court tomorrow morning. If such an exhibit is requested by the jury, we would send it back without reconvening and put it on the record the next time we meet in court.

I will not be allowing Plaintiff to recommend a certain dollar figure or range in their summation. We will put this on the record tomorrow morning.

Also, heads up for tomorrow morning. We have Grand Jury empanelment which means that there will be a lot of people going through the magnetometers starting at 8 am. I am told it will probably take an hour for everyone to go through.

Thank you!

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From: Thomas R. Southard <tsouthard@lippes.com>

Sent: Friday, April 4, 2025 9:51:48 AM

To: Nicole Austin <Nicole_Austin@nywd.uscourts.gov>; John Lyle <John_Lyle@nywd.uscourts.gov>; Katelyn Popp <Katelyn_Popp@nywd.uscourts.gov>; Meredith Vacca <Meredith_Vacca@nywd.uscourts.gov>

Cc: Hanft, Gideon A. <Gideon.Hanft@wilmerhale.com>; Kirstie A. Means <kmeans@lippes.com>; Spencer Durland <sdurland@hooverdurland.com>; Firsenbaum, Ross <Ross.Firsenbaum@wilmerhale.com>; Perio, RYANNE <RYANNE.Perio@wilmerhale.com>; jbrudin@rudinlaw.com <jbrudin@rudinlaw.com>; James P. Blenk <jblenk@lippes.com>; Brian C. Mahoney <bmahoney@lippes.com>; buffalo_5_plaintiff_counsel@list.wilmerhale.com <buffalo_5_plaintiff_counsel@list.wilmerhale.com>; Jennifer C. Persico <jpersico@lippes.com>

Subject: DX 707 and DX 697

CAUTION - EXTERNAL:

Dear Judge Vacca,

Please see the below link to a share drive that contains DX 707 (Guadagno Deposition Transcript) and DX 697 (Cosgrove Deposition Transcript) highlighted for the County's deposition designations and Plaintiff's counter designations that were received in evidence on April 3.

<https://ws.onehub.com/folders/ksxqcob9>

Password: KYj87%Bh#43

Thank you,

Tom Southard

Thomas R. Southard
Associate



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Buffalo, NY 14202-2216

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